

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 06 October 2003

BALCA Case No.: 2002-INA-226
ETA Case No.: P2001-NJ-02467058

In the Matter of:

FAMEX INTERNATIONAL SHIPPING,
Employer,

on behalf of

MOHAMMAD REZA FARJAM,
Alien.

Appearance: Garo Bakmazian, Esquire
Ridgefield, NJ
For Employer

Certifying Officer: Dolores Dehaan
New York, NY

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification filed on behalf of Mohammad Reza Farjam ("Alien") by Famex International Shipping ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

The following decision is based on the record upon which the CO denied certification and

Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On January 13, 1998, Employer, Famex International Shipping, filed an application for labor certification on behalf of the Alien, Mohammad Reza Farjam, for the position of "Export Manager," which was classified by the Job Service as "Import/Export Agent." (AF 40). The job duties for the position included preparing airway bills, bills of lading, certificates of origin and export declarations, as well as maintaining updated information on tariffs, shipping and licensing regulations, among other duties. (AF 40). The stated job requirements for the position were a high school diploma and four years experience in the job offered. (AF 40).

In a Notice of Findings ("NOF") issued on February 22, 2002, the CO proposed to deny certification on the grounds that Employer had rejected two qualified U.S. applicants [Anil Bhandari and Laszlo Friedman] for other than lawful, job-related reasons, and failed to show that the job opportunity was clearly open to qualified U.S. workers, in violation of 20 C.F.R. §§656.21(b)(6) and 656.20(c)(8). (AF 47-50). Employer submitted its rebuttal on or about March 27, 2002. (AF 51-56). The CO found the rebuttal unpersuasive and issued a Final Determination, dated April 10, 2002, denying certification on the same basis. (AF 66-67). On or about May 24, 2002, Employer appealed the Final Determination and the matter was docketed in this Office on June 14, 2002. (AF 1, 70-71).

DISCUSSION

An employer must demonstrate that the job opportunity was clearly open to any qualified U.S. worker. 20 C.F.R. §656.21(c)(8). An employer must show that any qualified U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. §656.21(b)(6). Therefore, an employer must take steps to ensure that qualified U.S. applicants are rejected only

for lawful, job-related reasons and not for subjective reasons which are either undocumented or unverifiable.

Although the regulations do not explicitly state a “good faith” requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are, therefore, a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are “able, willing, qualified and available” to perform the work. 20 C.F.R. §656.1.

In the report of recruitment results, Fadi Kabbara, who is subsequently identified as Employer’s President (AF 69)¹ stated that he called Mr. Friedman and Mr. Bhandari at the numbers listed on their resumes. Employer noted that the applicants failed to return his calls and he was unable to assess the applicants’ qualifications for the position. (AF 36-37).

In the NOF, the CO determined that of the four applicants for the position, two were lawfully rejected. The other two applicants, Mr. Friedman and Mr. Bhandari, were considered qualified for the position. The CO noted that these two applicants indicated more than four years of qualifying experience for the position. Although Employer claimed to have contacted these applicants, there was no evidence of such contact in the record. The CO requested telephone logs and/or copies of letters sent to the applicants and certified mail receipts. (AF 47).

Employer’s rebuttal consisted of a cover letter by Employer’s counsel, dated March 27, 2002, (AF 56); an explanatory letter by “Rola Kabbara, President” (AF 55); and a telephone log.

¹Employer’s Request for Review, dated May 24, 2002, was signed by “Fadi Kabbara, President.” (AF 69). However, earlier documents were signed by “Rola Kabbara, President.” (AF 40, 52).

(AF 54). In summary, Employer stated that, as the telephone log indicated, he called Mr. Friedman, but he did not return the call. Employer also stated that he called Mr. Bhandari on December 17, 18, and 19, 2000, but there was no answer on any of these occasions. (AF 55).

In the Final Determination, the CO found Employer's rebuttal inadequate. (AF 66). We agree. Although there is documentation that Employer tried to contact Mr. Friedman by telephone once and Employer asserts that he tried, unsuccessfully, to call applicant Mr. Bhandari on three occasions, these efforts are clearly insufficient to establish a good faith recruitment effort. In the present case, Mr. Friedman's resume lists a daytime telephone number, an evening number, a mobile number, a fax number, an e-mail address, and a regular address. (AF 29). Yet, Employer's "earnest effort" to contact him consisted of one telephone call. Similarly, Mr. Bhandari's resume includes a telephone number, an e-mail address, and a regular address. (AF 22). However, Employer only sought to reach him by telephone.

If the applicant has provided multiple phone numbers, an employer who merely attempts to call one of the numbers has not shown a reasonable effort to contact the applicant. *Bruce A. Fjeld*, 1988-INA-333 (May 26, 1989) (*en banc*). Multiple attempts to call one of the numbers when the applicant has provided more than one contact number is also inadequate. *Bay Area Women's Resource Center*, 1988-INA-379 (May 26, 1989) (*en banc*).

Further, reasonable efforts to contact an applicant may require more than a single type of attempted contact. *Any Phototype, Inc.*, 1990-INA-63 (May 22, 1991) (holding that an employer has not made a reasonable effort to contact an applicant by making unanswered phone calls and leaving a message on an answering machine, when an address for that applicant is available). An employer is obligated to try an alternative means of contacting a seemingly qualified U.S. applicant, such as by mail. *See, e.g., Northeastern Lumber and Millwork*, 1994-INA-105 (Feb. 13, 1995); *Jerry's Bagel*, 1993-INA-461 (June 13, 1994); *L.G. Manufacturing, Inc.*, 1990-INA-586 (Feb. 5, 1992). In this case, Employer neither attempted to contact the applicants at one of the other contact numbers provided nor attempted contact by an alternative method, such as by

certified mail. Employer has not shown a good faith effort to recruit. In view of the foregoing, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.